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No. 77-1691

In the Supreme Court of the United States

OCTOBER TERM, 1978

WAN SHIH HSIEH, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 569 F.2d 1179. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on January 12, 1978. A petition for rehearing with a suggestion for rehearing *en banc*

was denied on February 27, 1978 (Pet. App. D). The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, petitioner is entitled to an injunction compelling the Immigration and Naturalization Service to expedite an investigation into the possibility that petitioner employed fraud in obtaining permanent resident status.

STATEMENT

1. Petitioner is a native and citizen of the Republic of China. She was admitted to the United States in 1966 on a non-immigrant visa. Her husband and three children did not accompany her but continued to reside in Taiwan (A. 70).[1] On January 3, 1973, petitioner invested $7,000 in a corporation owning the Hsin Hsin Chinese Restaurant in Brooklyn, New York (A. 71, 86). The following month, the restaurant submitted an application for petitioner's employment to the United States Department of Labor (A. 84-85). Accompanying the application was an affidavit stating that petitioner had been employed as a chef in the Kwok Kong Restaurant in Taipei City, Taiwan, from March 1959 until August 1965, and that petitioner was therefore qualified to work as a specialty chef in the restaurant (A. 87-90).

[1] "A." refers to the administrative record filed in the court of appeals.

The labor certification was issued by the Department of Labor on April 11, 1973 (A. 83). The restaurant then filed a petition with the Immigration and Naturalization Service (INS) to qualify petitioner under 8 U.S.C. 1153(a)(6) as a "sixth preference immigrant" on the basis of her approved labor certification as a Chinese specialty cook (A. 95-96).[2] The preference petition was approved by INS and, pursuant to petitioner's subsequent application, petitioner was granted permanent resident alien status on November 9, 1973 (A. 97-100).

After receiving permanent resident status, petitioner sought to obtain immigration visas for her children remaining in Taiwan. She petitioned INS to grant the children "second preference" immigration status under 8 U.S.C. 1153(a)(2) as the unmarried offspring of a lawfully admitted permanent resident alien (A. 72). INS approved the preference petitions on April 9, 1975, and the children thereafter applied to the American consulate in Taiwan for immigrant visas (A. 55, 72).

In processing the visa applications, however, the consul discovered that petitioner's household register did not reflect that she had ever been employed at the Kwok Kong Restaurant (A. 101).[3] Suspecting that

[2] 8 U.S.C. 1153(a)(6) provides an immigration preference for "qualified immigrants who are capable of performing specified skilled or unskilled labor * * * for which a shortage of employable and willing persons exists in the United States."

[3] In Taiwan, a household register is an official record kept by both the central and local governments that indicates,

petitioner's permanent resident status had been procured by fraud, the consul, in a communication received by INS on September 15, 1975, requested INS to provide further documentation concerning petitioner's status (A. 101). Meanwhile, the consul sought verification for the statements in petitioner's permanent residency application by interviewing petitioner's twenty-five year-old son. In a sworn statement, the son stated that his mother had worked as a pedicab driver in Taiwan and that she had not worked as a chef prior to her departure to the United States (A. 73, 102-104). The consul concluded from his investigation that petitioner had obtained her immigration status by fraud, and advised INS on March 15, 1976, that no action would be taken on the children's visa applications pending further notice from INS (A. 104).

INS initiated an investigation into the truthfulness of petitioner's permanent residency application in May 1976 (A. 8, 73, 104). On August 25, 1976, petitioner, accompanied by her attorney, was interviewed at the INS office in New York City (A. 10, 20-21).[4] Petitioner was informed at that time that the interview concerned allegations that she had fraudulently acquired her permanent resident status and that she would be questioned concerning her work

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among other things, the education, occupation and employment, spouse, and parents of each adult member of a household (Pet. App. 4a).

[4] The interview was conducted through a Chinese-speaking interpreter.

experience (A. 10, 20). Petitioner stated at the interview that she had learned to cook at the Kuo-Bin Restaurant in Taiwan, but that it was a training experience and not an actual job (A. 11, 20). When the investigator attempted to explore the distinction between training and gainful employment, petitioner's attorney (who spoke Chinese) questioned the accuracy of the interpreter's translation of the investigator's question; at the request of petitioner's attorney, the interview was then adjourned to enable the attorney to confer with his client (*ibid.*). Following the brief adjournment, petitioner stated that she had been employed as a chef at the Kuo-Bin Restaurant in Taiwan (A. 11, 20-21). Confronted with the labor certification application which stated that she had worked for more than six years in the Kwok Kong Restaurant in Taiwan, petitioner responded that she had not mentioned this other employment because she had not realized that the investigator wanted to know about it (A. 11, 21).

Petitioner then stated that she had worked at the Kwok Kong Restaurant for "over a year" (*ibid.*). Petitioner's attorney claimed that the translation was incorrect, and he again challenged the translation when the investigator asked petitioner who operated the Kwok Kong Restaurant (*ibid.*). Petitioner's attorney continued to interrupt the interview both by attempting to answer questions for his client and by challenging the relevancy of the questions, including questions relating to petitioner's work as a pedicab

driver in Taiwan (A. 12, 21).[5] The investigator explained the relevancy of this line of questioning, but petitioner's attorney continued to object (*ibid.*). The investigator then terminated the interview because of petitioner's attorney's failure to cooperate (*ibid.*).

2. On August 27, 1976, two days after the interview, petitioner instituted this action in the United States District Court for the Southern District of New York. Claiming that INS had unreasonably delayed its investigation, she sought an order directing INS to complete its investigation or directing the consul in Taiwan to issue immigration visas to petitioner's children (A. 1-3, 12; Pet. App. 15a). During the pendency of the proceedings in the district court, INS repeatedly offered to continue the investigation and to complete petitioner's interview. Petitioner rejected these offers, stating that the "case [was] * * * pending before the U.S. District Court" (A. 13-14, 27-28, 145) and that "it [was] a bit late for [INS] to show interest" (A. 39). See also Pet. 10 n. 4.

On August 26, 1977, the district court dismissed petitioner's complaint. The court held that petitioner was not entitled to any relief because the consul's duties in issuing visas were not subject to judicial review and because INS had not acted arbitrarily or unreasonably in failing to complete the investigation

[5] Petitioner admitted that she had worked as a pedicab driver, but her attorney's objections prevented her from responding to questions concerning when she had done this work (*ibid.*).

(Pet. App. 24a-25a). The court of appeals affirmed on the additional ground that INS had no duty to investigate whether the visa applications should be granted (Pet. App. 10a-12a).

ARGUMENT

Petitioner contends (Pet. 12-23) that the INS is under a legal duty to respond to the inquiry of the consul in Taiwan by investigating expeditiously the possibility that petitioner employed fraud in obtaining her status as a permanent resident alien. Petitioner also asserts (Pet. 23-28) that the INS has failed to perform this obligation and should be compelled to do so by court order.[6] As the court of appeals properly held, petitioner's claims are without merit.

1. Under 28 U.S.C. 1361, district courts have jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States * * * to perform a duty owed to the plaintiff."[7] But,

[6] Petitioner no longer claims that the court should order the consul in Taiwan to issue immigration visas to petitioner's children. The claim is unavailable because the decision of a consular officer abroad not to grant a visa is immune from judicial review. See, *e.g.*, *Rivera de Gomez* v. *Kissinger*, 534 F.2d 518, 519 (C.A. 2), certiorari denied, 429 U.S. 897; *Burrafato* v. *United States Department of State*, 523 F.2d 554, 556-557 (C.A. 2), certiorari denied, 424 U.S. 910; *Loza-Bedoya* v. *Immigration and Naturalization Service*, 410 F.2d 343, 347 (C.A. 9). See also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766.

[7] The Administrative Procedure Act similarly confers a right to sue to "compel agency action unlawfully withheld or unreasonably delayed * * *" (5 U.S.C. 706(1)). Although that

as the court of appeals held (Pet. App. 9a), INS is under no duty in this case to conduct an immediate investigation for the purpose of determining whether visas should be issued to petitioner's alien children living abroad or whether petitioner's permanent resident status should be rescinded.

When petitioner asked INS to approve preference petitions for her children, the only question the Service had a duty to decide was the one it did decide: whether these were the children of a permanent resident alien. 8 U.S.C. 1153(a)(2). Pursuant to its regulations, INS immediately forwarded the approved preference petitions to the consular officer. 8 C.F.R. 204.3. Since the consular officer suspected that approval of the petitions had been obtained by fraud, however, he "return[ed] the petition[s] * * * for reconsideration by the [INS]." 22 C.F.R. 42.43(a). In making this determination the consul was exercising, as the court of appeals correctly held (Pet. App. 7a), his unreviewable discretion over the issuance of visas. See *Rivera de Gomez* v. *Kissinger*, 534 F.2d 518, 519 (C.A. 2); note 6, *supra*.

After the consul declined to act on the petitions, the INS regulations required only that INS reconsider the petitions and, if the petitions were revoked, that "the consular office having jurisdiction over the visa application shall be notified of the revocation." 8 C.F.R. 205.3. INS had discretion, but no duty, to decide whether to pursue an investigation of petitioner's possible fraud in obtaining permanent resident status and, if so, whether to institute proceedings to rescind that status. As the court of appeals held (Pet. App. 10a-11a), these

> * * * are matters solely within the INS's discretion, * * * and hence are not reviewable under the Administrative Procedure Act or 28 U.S.C. § 1361. Moreover, the INS has five years from the date when appellant acquired her permanent resident status within which to institute rescission proceedings. * * * In short, neither the children's application for admission into the United States as immigrants nor the Consul's request to the INS create a duty on the part of the INS to appellant to investigate whether rescission proceedings should be instituted, much less to complete any such investigation within a shorter period than [the five years] provided by § 246(a) of the Act, 8 U.S.C. § 1256(a). [Citations omitted.]

2. But even assuming, *arguendo*, that INS has a duty to complete its investigation within a reasonable period of time, INS has not violated that duty in this case. Petitioner has shown no violation at all, much less the derogation of a duty that was "plainly defined" and "peremptory". Nor has she shown that she had a "clear right * * * to the relief sought" and

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statute does not grant subject matter jurisdiction (*Califano* v. *Sanders*, 430 U.S. 99, 105), the district court (Pet. App. 28a, n. 7) found that subject matter jurisdiction existed under 28 U.S.C. 1331(a). See *Andrus* v. *Charlestone Stone Products Co., Inc.*, No. 77-380, decided May 31, 1978, slip op. 3-4, n. 6. Assuming, ~~however,~~ that jurisdiction would exist under 28 U.S.C. 1331(a), as amended by Pub. L. 94-574, Section 2, 90 Stat. 2721, for the reasons noted in the text, INS did not "unlawfully" or "unreasonably" withhold its investigation of the possible fraud in this case.

that "no other adequate remedy [is] available." *King* v. *Morton*, 520 F.2d 1140, 1146 (C.A.D.C.); *Winningham* v. *United States Department of Housing and Urban Development*, 512 F.2d 617, 620-621 (C.A. 5); *Lovallo* v. *Froehlke*, 468 F.2d 340, 343 (C.A. 2), certiorari denied, 411 U.S. 918.[8]

There are no statutory provisions or agency regulations that plainly define or specify the supposititious duty of INS to conduct investigations into the possibly fraudulent status of permanent resident aliens at the behest of consuls abroad.[9] Nor is there anything to suggest that such an investigation must be completed in less than the five year period that Congress has authorized for rescission of the decision granting permanent resident status. See 8 U.S.C. 1256(a); *Zaoutis* v. *Kiley*, 558 F.2d 1096 (C.A. 2). The duty that petitioner claims to exist is, at best, implicit in the regulatory scheme and subject to a reasonable and flexible administrative interpretation. Clear dereliction would be required before the courts would interfere with the agency's processes.

Petitioner has made no such showing. INS had instituted an investigation into the lawfulness of peti-

[8] Nor has petitioner shown that INS's conduct has transcended any rational exercise of discretion so as to call for issuance of the writ of mandamus. See *Leonhard* v. *Mitchell*, 473 F.2d 709, 713 (C.A. 2), certiorari denied *sub nom. Leonhard* v. *Richardson*, 412 U.S. 949.

[9] To the contrary, it has been recognized that the decision whether to review the status of a permanent resident alien is committed to INS's discretion. See *United States* v. *Santelises*, 476 F.2d 787, 790 (C.A. 2).

tioner's permanent resident status, and did so not long after receiving the consul's inquiries. Although the investigation cannot proceed unless petitioner will submit to an interview (A. 14), INS has repeatedly sought to conduct such an interview (A. 13-14, 27-28, 39), and has informed petitioner that its investigation can probably be concluded within two months after the interview takes place (A. 14). Petitioner thus has a readily available administrative remedy that obviates any need for judicial compulsion. As the district court found (Pet. App. 24a-25a), INS has not "abused its discretion or acted arbitrarily, unreasonably or illegally" in this case.

The decisions of the courts below denying injunctive relief were therefore correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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